United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

76-1349

To be argued by
IRVING MANDELL

In The

United States Court of Appeals

For The Second Circuit

GRAND JURY SUBPOENA DUCES TECUM,

Served Upon

AUTOMATED BREAD DISTRIBUTORS, CORP.,

Respondent-Appellant

BRIEF FOR RESPONDENT-APPELLANT

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2. Is Title 18, U.S.C. Section 3331 unconstitutional in that it deprives a Grand Jury "target" of his constitutional right to a speedy trial and of due process of law, and that it permits an overzealous prosecutor through use of Grand Jury Subpoenas to inflict cruel and inhuman punishment upon the real "targets" of the Strike Force investigation in the case at bar?

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UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

- -x

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APPELLANT'S MEMORANDUM OF LAW

STATEMENT

This appeal is taken from an order of Hon. Edward R. Neaher, dated July 22, 1976 which denied Appellant Automated Bread Distributors, Corp., ("Automated's") motion to quash a Grand Jury Subpoena Duces Tecum dated May 27, 1976 (*20) and to discharge the Grand Jury. (3).

Subsequently Judge Neaher stayed Appellant's appearance before the Grand Jury pending a determination of this appeal. (83).

FACTS

At this point in its Brief, Appellant will not burden the Court with a recital of the facts upon which it relies in

*References are to pages in the Appendix.

support of its argument seeking reversal of the order of the Court below. The affidavit of Mark Jacobson in support of the Appellant's motion (6) together with the affidavit submitted by Appellant's attorney (67) set forth with particularity the chronology of the events which have prompted this motion. Furthermore, the pertinent facts will hereafter be reviewed in detail in conjunction with the Points contained in Appellant's argument which follows.

However, a brief description of the scenario and the Dramatis Personae is necessary at this time.

The principal officer and stockholder of Appellant "Automated", is Mark Jacobson, who is 26 years old, college educated, married and father of one child. (9). His father is Sam Jacobson, reputedly a "mob-figure", (11, 32), which charge has been denied by him in paid advertisements published in three New York newspapers. (12, 40). Neither father nor son have ever been convicted of any crime. (9, 11).

On October 29, 1974, Ranger Bakers, Inc., ("Ranger"), of which Mark Jacobson was President and chief stockholder, acquired the assets of bankrupt Silvercup Bakers, Inc., ("Silvercup") pursuant to an order of the Bankruptcy Court. (24). Sam Jacobson was never a stockholder or officer of Ranger. (35).

Immediately after Ranger acquired Silvercup, Mark Jacobson, Ranger and Silvercup came under attack by the Strike Force, the IRS and ultimately by the Sunday News. (7, 9, 10, 31, 32). The details are hereafter set forth in this Brief.

As a result of these attacks, Ranger sustained serious financial reverses and was forced to close its operations with an attendant loss of approximately 500 jobs in financially troubled New York City. (15).

Ranger and Mark Jacobson have sued the IRS claiming that they were singled out for special and unevenhanded treatment which contributed to the demise of Ranger. (46). That suit is still pending. (15). Ranger and Mark Jacobson sued the News and the reporter who wrote the libelous article about them and that suit is still pending. (36). The Jacobsons contend that the article containing false information could not have been written without improper disclosures of confidential information by law enforcement agencies to the News reporter. (13).

Following the commencement of these lawsuits, the IRS stepped up its "investigations" of Jacobson family-owned companies and also increased its pressure against Mark Jacobson personally. (7, 70).

Following the commencement of these suits the Strike Force also exerted new pressures against the Jacobsons and their family-owned companies. (13). In fact, on October 6, 1975 at the request of the Government, Judge Mishler impanelled a Special Grand Jury with a permissible life expectancy of three years, (84) allegedly for the purpose of investigating false statements, concealment of facts and depletion of assets in

relation to the bankruptcy of Silvercup Bakers, Inc. (63). This new Special Grand Jury is apparently the successor to a prior regular or Special Grand Jury which had subpoenaed all of Silvercup's books and records and Ranger's books and records more than a year ago. (11, 27, 29).

The instant subpoena adds still another Jacobson family-owned company to the long list of companies previously subpoenaed before Grand Juries since February, 1973. (27, 29, 52). It thus appears at this time, that the Jacobson family name (there can be no doubt that the Government has "targeted" the individuals, not the corporations) has been vilified before at least one and possibly two prior Grand Juries before Judge Mishler impanelled the latest Grand Jury on October 6, 1975. (Stenographic Minutes of July 21, 1976, P. 20*).

Although the Appellant argued below that information relating to prior Grand Juries should be disclosed by the Special Attorney, that request was denied, and the Special Attorney was only directed to produce a copy of the impanelling order of the present Special Grand Jury and then not even the affidavit submitted to Judge Mishler in support of that application. (S.M. 8, 9, 11, 12, 14, 15, 17, 19).

Finally, it appears that the IRS has audited and is still auditing the very books and records that have been

*References to Stenographic Minutes are hereafter referred to as (S. M., followed by the page).

subpoenaed before the Grand Jury (20, 21, 72) and that said audit was surreptiously conducted by the Strike Force of the IRS. (72).

Based on the foregoing, Appellant contends that the Court below erred in denying its motion to quash the Subpoena and to discharge the Grand Jury on the following grounds:

1. That the Special Grand Jury is so dominated by the Special Attorney and his associates as to preclude its historically intended role of standing between the accuser and the accused.

2. That there have been improper disclosures of confidential and secret information by law enforcement personnel to a reporter of the News.

3. That the office of the Special Attorney for the Strike Force has unnecessarily and unreasonably delayed presenting its evidence, if any, of wrongdoing to the Grand Jury and is using that body solely as a means of harassing the Jacobsons individually and Jacobson family-owned corporations.

4. That the impanelling of still another Grand Jury with a permissible life expectancy of three years, tacked on to prior Grand Juries investigating the same persons is an unconstitutional deprivation of their right to a Speedy Trial under the Sixth Amendment; violates their right against cruel and inhuman punishment as guaranteed by the Eighth Amendment

and deprives them of Due Process under the Fifth Amendment.

5. That the simultaneous audit of Appellant's records by the IRS and the Special Grand Jury Subpoena of the same records is improper and should not be permitted.

Appellant urges that at the very least the Court below erred in failing to grant Appellant an evidentiary hearing on its allegation of improper disclosure by law enforcement personnel of confidential information to the news media and in failing to grant a hearing to determine the number, types and duration of Grand Juries which have previously investigated the Jacobsons.

POINT I

THE SPECIAL GRAND JURY SUBPOENA SHOULD BE QUASHED AND THE GRAND JURY SHOULD BE DISCHARGED BECAUSE IT IS BEING USED BY THE STRIKE FORCE SOLELY TO HARASS THE JACOBSON FAMILY AND NOT FOR ITS HISTORICALLY INTENDED PURPOSE OF STANDING BETWEEN THE ACCUSER AND THE ACCUSED.

It is submitted that in its response to the Appellant's motion the Government has failed to controvert the following allegations made by Appellant which must therefore be deemed to be true:

(A) That the Jacobson family and more particularly Sam Jacobson have been and still are the real "targets" of Grand Jury Subpoenas and more particularly the one in the case before this Court. (13, 16, 31, 70, 71).

(B) That Sam Jacobson has been under an intensive and ongoing investigation by various law enforcement agencies and the IRS for at least ten years, (11) and that he has never been convicted of a crime. (11).

(C) That companies in which Sam Jacobson had or has an interest or is reputed to have an interest have been called before two or possibly three different Grand Juries during the past three and one-half years. (52). The pattern suggests that this will go on for the rest of Sam Jacobson's life unless curtailed by this Court. (13).

(D) That the Government has extended its harassing tactics to Mark Jacobson, Sam Jacobson's 26 year old son and

to companies in which he had or has an interest or is reputed to have an interest and this harassment may continue for the rest of his life unless curtailed by this Court. (14).

(E) That the Grand Jury Subpoena served upon Louis Wallach an insurance agency which does business with Jacobson family-owned companies clearly demonstrates that both Mark and Sam Jacobson are "targets" of the Strike Force since they are personally named in the subpoena. (31).

Indeed that subpoena is further proof of the "shotgun" technique employed by the Strike Force to harass the Jacobson family in that it sought information, not only about the Jacobsons personally, but also about five separate and distinct corporations as well. Neither Rojo Trucking Co. nor Key Foods are companies in which the Jacobsons have an interest. It is obvious that Key Foods was named in the Wallach subpoena and was recently served with a separate Grand Jury Subpoena in order to intimidate this reputable company from doing business with Jacobson family-owned companies. (12). In fact, the instant Grand Jury Subpoena served upon Appellant seeks records involving still another highly reputable customer of Jacobson family-owned companies, to wit, Waldbaums. (20). Is it unfair to surmise that Waldbaums has been subpoenaed before the same Grand Jury and that the purpose is to discourage it from doing business with the Jacobsons?

(F) That Mark Jacobson is now also a target of the IRS acting in concert with the Strike Force is proven beyond doubt by the untruthful statements of IRS agents that they knew that he had been convicted of tax evasion (9). The fact is that Mark Jacobson has never been charged with a crime, much less convicted of one! (9).

It would be instructive to learn who had poisoned the minds of these IRS agents who were presumably involved in routine collection procedures. It would help explain why the IRS singled out Ranger Bakers, Inc., for special and uneven-handed tax treatment (54-56) while allowing Silvercup to avoid a withholding tax liability of almost two million dollars incurred before a Jacobson owned company acquired it. (25). The harsh, punative acts of the IRS ultimately led to the demise of Ranger and the loss of jobs by approximately 500 of its employees. (56, 57). A suit is pending against the IRS because of its destructive and illegal conduct.

It is further conceded by the Government:

(G) That the IRS subsequently called for an audit of Appellant's 1974 tax return to which Appellant voluntarily submitted without having been advised that the audit was "not routine" and was being conducted by the Strike Force of the Brooklyn IRS. (72). This Court can take judicial notice that the Strike Force of the Brooklyn IRS and the Strike Force Against Organized Crime, which has subpoenaed Appellant before a Special Grand Jury have their offices in the same building

at 35 Tillary Street, Brooklyn, New York. Indeed the Strike Force offices are on the third floor of the IRS side of the building rather than the side of the building occupied by the offices of the U. S. Attorney and the Courts. This is significant in view of the Government's disclaimer in opposition to Appellant's instant motion that it was aware of the IRS audit of Appellant's 1974 tax return, and that there was no comminication between the agencies. (63 et seq.)

Is that statement believable in view of the fact that the IRS notice of audit of Automated although addressed to Automated's Brooklyn address (21) was conducted in Long Island City where Appellant's books were maintained and that the instant Grand Jury Subpoena was addressed to and was sought to be served by an FBI agent acting on behalf of the Strike Force upon Automated in Long Island City (20, 69). In fact, the FBI agent gained access to the premises in Long Island City by asking for Automated's bookkeeper by name. (69). How did the Strike Force and the FBI acting in conjunction with it know to go to Long Island City rather than Brooklyn unless they were in contact with the IRS agent who had previously found Automated's books there? How did the FBI agent know the name of Appellant's bookkeeper unless he had learned it from the IRS agent who had met the bookkeeper while doing his audit? The evidence points to the conclusion that these three agencies are working in concert for the common purpose of getting the Jacobsons.

The uncontroverted facts further reveal:

(H) That all the books and records of Silvercup, in which Ranger acquired an interest pursuant to an order of the Bankruptcy Court in October, 1974, have previously been subpoenaed before a Special Grand Jury. (10).

(I) That certain books and records of Ranger Bakers were thereafter subpoenaed to the Grand Jury by the same Mr. Shanley of the Strike Force. (27).

(J) That after Ranger's Court approved acquisition of Silvercup, FBI agents visited and intimidated Ranger's vendors and banks. (61). As a result of these visits Ranger's economic demise was practically assured. (59).

(K) That starting several weeks before Ranger was served with its Grand Jury Subpoena and two days after said Subpoena of May 9, 1975 was served, articles appeared in the News and more particularly on May 11, 1975, falsely depicting Silvercup, which had been acquired by Ranger, as "mob-controlled". (32). The writer of those articles concedes that his information came from law enforcement sources including the Strike Force. (32). The Jacobsons contend that some of the statements made in those articles came from sources which are secret and not available to the public and that the statutory interdiction of secrecy of Grand Jury proceedings may have been violated. (13). (See PointIV infra).

An action for libel was commenced by Mark Jacobson and Ranger Bakers and is presently pending against the reporter who wrote the false article and the newspaper which published it. (36). The Jacobsons contend that the libelous article was written with the full knowledge, consent, connivance and approval of various law enforcement agencies, particularly the Strike Force, for the sole purpose of publically humiliating, embarrassing and harassing the Jacobsons. (13).

Furthermore, Appellant contends that the following additional acts demonstrate that the present Special Grand Jury and prior Grand Juries have been used by Special Attorney Shanley and his predecessors solely for the purpose of harassing the Jacobsons thereby subverting the historically intended purpose of the Grand Jury of standing between the accuser and the accused. (14).

(L) That in February, 1973, approximately 3½ years ago, Mr. Shanley's predecessor, a Michael B. Pollack, Esq., as Special Attorney for the Strike Force, subpoenaed the books and records of the <u>other</u> companies in which the Jacobsons had an interest, to wit, Automation Transportation Corp. and Classic Truck Renting Corp. (15, 52). The records sought were voluntarily turned over to Mr. Pollack who presumably examined them thoroughly. Nothing came of those "investigations" except that the "fishing" continued and continues unabated.

(M) That such "fishing" goes on is demonstrated by

the fact that the Strike Forces' co-conspirator, the IRS, has suddenly, after 3½ years, revived its interest in Automation (74) and has brought still another company under scrutiny. (75). The fact that these recent inquiries followed Appellant's instant motion to Quash the Grand Jury Subpoena is not coincidental.

From the foregoing uncontroverted excerpts taken from the Record (there are many others equally persuasive) Appellant's argument that the Strike Force is acting in concert with the FBI, the IRS and the News and that the Strike Force has used the Grand Jury Subpoena and in particular the one in issue, solely to harass and intimidate the Jacobson family and to hurt them economically is clearly evident.

Furthermore it appears that the Grand Jury Subpoena is also being used in an attempt to pressure Mark Jacobson into discontinuing his action against the News before that defendant will be compelled to testify whether improper disclosures of secret information have been made to its reporter and who made these disclosures. (13).

It has clearly been shown that the Strike Force had targeted the Jacobsons through use of Grand Jury Subpoenas as early as February, 1973, almost two years before Silvercup was acquired! (52). That much is known for a fact! A safe guess is that "investigations" before predecessor Grand Juries have been going on for years and will go on for years unless curtailed by this Court!

It is therefore clear that Judge Mishler was induced to impanel the latest Special Grand Jury on October 6, 1975 upon a bad faith representation of a law enforcement official that "the investigation encompasses false statements, concealment of facts and depletion of assets in relation to the bankruptcy of Silvercup Bakers, Inc." (emphasis added) (63). Since the affidavit in support of the request for a Special Grand Jury has not been disclosed, although Appellant requested its disclosure, it must be assumed that Judge Mishler was not aware that prior Grand Juries had "investigated" the Jacobson family for several years before Ranger acquired its interest in Silvercup in October, 1974. Had he known, he might have refused to impanel still another Grand Jury under the domination of the Government which was conducting a vendetta against the Jacobson family.

Since it appears that the Grand Jury has been stripped of its historically intended function "to stand between the accuser and the accused, the Subpoena should have been quashed and the Grand Jury discharged.

See, Wood v. Georgia, 370 U. S. 375, 390 (1962); United States v. Gardner, 516 F.2d 334, 339 (7th Cir. 1975).

POINT II

THE ORGANIZED CRIME ACT WHICH EMPOWERS FEDERAL JUDGES TO IMPANEL SUCCESSIVE SPECIAL GRAND JURIES AND TO EXTEND THEIR TERM FOR SUCCESSIVE THIRTY-SIX MONTH PERIODS IS UNCONSTITUTIONAL.

It is clear that at least as early as February, 1973, a Grand Jury was in existence and that Mr. Shanley's predecessor, Mr. Pollack, Special Attorney to the Strike Force, had subpoenaed two Jacobson family-owned corporations before that Grand Jury. (55). That was three and one-half years ago. The present Special Grand Jury, impanelled by Judge Mishler on October 6, 1975 under Title 18, U.S.C. Section 3331[1]* has a permissible life expectancy of approximately two more years. Assuming that there was no Grand Jury investigating the Jacobsons prior to February, 1973 (which is highly doubtful, since Sam Jacobson has been under investigation for 10 years) and that none will continue to investigate them upon the expiration of the present Grand Jury (which is highly doubtful), it is clear that the Jacobsons will have been in the position of "accused persons" for at least five and one-half years.

In the event that successive Special Grand Juries are impanelled after the expiration of the latest Grand Jury, it is conceivable that the Jacobsons will be in the position of "accused persons" as long as they live. It is inconceivable

*1. The footnotes appear in the addendum to this Memorandum of Law.

that the legislature intended to vest such awesome power in the hands of a Special Attorney for the Strike Force. See, United States v. Fein, 504 F.2d 1170 (2d Cir. 1974).

The Grand Jury actually conducts its own mini-trial and since the "target" is not afforded an opportunity to defend himself, his rights are intruded upon in a manner that would not be permitted if he stood accused before a petit jury after arrest and indictment. The Grand Jury has properly been characterized as "a grand inquest, a body with powers of investigation and inquisition, the scope of whose inquiries is not to be limited narrowly by questions of propriety or forecasts of the probable result of the investigation, or by doubts whether any particular individual will be found properly subject to"accusation"of a crime."

See, Blair v. United States, 250 U. S. 273, 282 (1918).

Thus so long as the target is under investigation before a Grand Jury he is actually on trial. Since Section 3331, Title 18 U.S.C. permits a delay of at least 3 years between the date of the initial accusation against a "target" before a Grand Jury and the date that an indictment may be returned against him (and longer delays where successive Special Grand Juries are impanelled) the Jacobsons right to a speedy trial under the Sixth Amendment[2] has been violated.

Justice Brennan recognized this problem in

United States v. Dickey, 398 U.S. 30 (1970), where he said in pertinent part:

> "Against this background of the purposes of the speedy-trial safeguard, I turn to the question of when during the criminal process the right attaches. A criminal prosecution has many stages, and delay may occur during or between any of them. It may take place at the beginning of the process: between the time at which the government decides to prosecute a man and has sufficient evidence to proceed against him and the actual time of his arrest or indictment. Or it may occur, for instance, between arrest and indictment, during trial, or between trial and sentencing." (p.43).
>
> * * *
>
> "Deliberate governmental delay in the hope of obtaining an advantage over the accused is not unknown. In such a circumstance, the fair administration of criminal justice is imperiled. The Speedy Trial Clause then serves the public interest by penalizing official abuse of the criminal process and discouraging official lawlessness. See, e. g., United States V. Provoo, 17 F.R.D. 183 (D.C. Md.) aff'd per curiam. 350 U.S. 857 (1955). Thus the guarantee protects our common interest that government prosecute, not persecute, those whom it accuses of crime." (emphasis added, p. 43).
>
> * * *
>
> "Deliberate governmental delay designed to harm the accused, however, constitutes abuse of the criminal process. It lessens the deterrent value of any conviction obtained. And it very probably reduces the capacity of the accused to defend himself; unlike the prosecution, he may remain unaware that charges are pending and thus fail to take steps necessary to his defense. Accordingly, some of the interests protected by the Speedy Trial Clause can be threatened by delay prior to arrest or indictment. Thus, it may be that for the

purposes of the clause to be fully realized, it must apply to any delay in the criminal process that occurs after the givernment decides to prosecute and has sufficient evidence for arrest or indictment." (emphasis added, p. 46).

Justice Brennan went on to say:

"These comments provide no definitive answers. I make them only to indicate that many--if not most--of the basic questions about the scope and context of the speedy-trial guarantee remain to be resolved. Arguments of some force can be made that the guarantee attaches as soon as the government decides to prosecute and has sufficient evidence for arrest or indictment; similar arguments exist that an accused does not lose his right to a speedy trial by silence or inaction, that governmental delay that might reasonably have been avoided is unjustifiable, and that prejudice ceases to be an issue in speedy-trial cases once the delay has been sufficiently long to raise a probability of substantial prejudice. Insofar as these arguments are meritorious, they suggest that the speedy-trial guarantee should receive a more hospitable interpretation than it has yet been accorded." (p. 57).

These comments, taken together with scathing criticism of the Grand Jury system mandates serious consideration of the dangers inherent in a statute which authorizes inquisitorial mini-trials without limit.

See, Note, Powers of Federal Grand Jurors, 4 Stan. L. Rev. 68 (1951); Rivera v. Government of the Virgin Islands, 375 F. 2d 988, 991 (3rd Cir. 1967) (where the Court characterized the Grand Jury system as "antiquated and

wellnigh useless"); Williams, The Crises in Law Enforcement, 54 Judicature, 418, 420 (1971) where the author states that Grand Jury proceedings are "an outmoded, archaic, fetish of yesteryear" and notes the long delays to the prospective defendant who is stigmatized by such a prolonged investigation. See, also. Vol. 8, Moore's Federal Practice Par. 6.02.

Appellant is aware of United States v. Marion, 404 U.S. 307 (1971) decided after the Dickey case which held that the failure of the Government to indict persons for crimes of which it was aware for three years prior to indictment was not a deprivation of their right to a speedy trial under the Sixth Amendment.

The case at bar is totally different and readily distinguishable. In our case there is no claim that the Government has knowledge that any crime has been committed. Indeed it appears that the Government is embarked upon a fishing expedition by which it is seeking to find or create facts to support a preconceived conclusion that the "targets" are criminals.

In Marion the majority of the Court indicated that it would have held otherwise had there been a showing that the Government intentionally delayed in order to gain a tactical advantage or to harass the Appellees. In the case at bar, Appellants have clearly shown that harassment is the primary purpose of the Government. Furthermore, the separate

concurring opinions of Judges Douglas, Brennan and Marshall show that they believe in the constitutional right to a speedy trial before indictment.

Were it to relegate its investigation to inter-office or inter-agency activities, the "targets", although perhaps unfairly condemned would suffer limited injury. Appellant does not contend, nor does the Jacobson family contend, that the Government may not investigate their activities. They do contend, however, that the continual and ongoing demeaning of their name and business activities before successive Grand Juries subjects them to notoriety and harassment by the Special Attorney against which they cannot protect themselves as they could before a petit jury.

Hon. Irving R. Kaufman commented on such activities as follows:

> "A great injustice can be done and irreparable injury caused to the reputation of a citizen if it becomes known that there is or ever was before the Grand Jury any proceeding concerning such a person subsequently not indicted. You can readily see that in the event of such unfortunate disclosure a stigma could attach to the name of this individual which it would be difficult, if not impossible, to eradicate."

See, Kaufman, The Grand Jury, Its Role and Its Powers, 17 F R D 331, 333.

Accusations have been, are being made and may be made against the Jacobsons for a lifetime. This constitutes persecution rather than prosecution, as stated by Justice Brennan in Dickey, supra.

That being the case, the Organized Crime Act by authorizing the impanelling of successive three year Grand Juries is unconstitutional as violative of the Sixth Amendment guaranteeing the right to a Speedy Trial:[2] the Eighth Amendment as prohibiting cruel and inhuman punishment of persons presumed to be innocent and who have never been convicted of any crime;[3] and the Due Process clause of the Fifth Amendment.[4]

Since Section 3331 can be used as an instrument of prolonged harassment and punishment, it should be struck down.

The foregoing arguments find support in those cases and statutes which hold that the Grand Jury may be discharged because of an unreasonable delay by the Government in presenting its evidence to the Grand Jury.

See, In Re Investigation of World Arrangement, Inc. 107 F. Supp. 628 (D.C.D.C. 1952); In Re Texas Co. 201 F.2d 177 (C.A.D.C. 1952), Cert. denied 344 U.S. 904 (1952). See also Rule 6(g) FRCP[5] and Rule 43 FRCP[6]; United States v. Williams, 378 F. Supp. 61 (D.C. Mo., 1974); United States v. Daneales, 370 F. Supp. 1289 (W.D.N.Y., 1974).

Certainly any statute such as Section 3331 which encourages delay is contrary to the spirit of these cases.

It is submitted that the Court below should have called upon the Special Attorney to file a table setting forth the time that has expired from the initial referral of the investigation of the Jacobsons and Jacobson family-owned companies to date. Said table would have to explain the

manner in which the cases involving the Jacobsons have been presented to Grand Juries. Based upon such disclosure the Court below could have set a time limit for further Grand Jury investigation into activities of the Jacobsons and companies in which they have an interest which have previously been subpoenaed before a Grand Jury.

The failure of the Court below to limit in any manner whatsoever the effect of Section 3331 constitutes a deprivation of Appellant's constitutional rights, requiring reversal of the Court's order.

POINT III

THE COURT BELOW ERRED IN FAILING TO QUASH THE GRAND JURY SUBPOENA IN VIEW OF THE SIMULTANEOUS INVESTIGATIONS OF AUTOMATED BEING CONDUCTED BY THE IRS AND THE STRIKE FORCE.

Appellant's books have been audited, and are still being audited in a civil case (albeit through false and devious pretenses). (72) Appellant contends that the Grand Jury Subpoena may now be used to obtain evidence against it for use in the investigation being conducted by the IRS. Although the Government denied knowledge of the IRS proceedings, (65) this denial in and of itself should not have convinced the Court below that there was no connection between the two agencies without first conducting an evidentiary hearing. In fact, at such a hearing the Government should have been compelled to disclose its affidavit in support of its application for the order impanelling the October, 1975 Grand Jury to allow Appellant to discover, if possible, information which might cast doubt on the accuracy of the Government's representations.

See, In Re Grand Jury Proceedings (Schofield) 486 F. 2d. 85, 93 (3d. Cir., 1973).

It has been held that while the Grand Jury may validly exercise its powers to determine the existence of criminal offenses, it may not be used to assist in a civil

investigation. In Re Morgan, 377 F. Supp. 281 (S.D.N.Y. 1974).

In United States v. Doe, 341 F. Supp. 1350 (S.D.N.Y., 1972) simultaneous investigations of the same taxpayer were being conducted by the IRS and the Grand Jury. Judge Frankel said (p. 1352):

> "It is my conclusion...That the grand jury's role is properly confined and amply respected where it is held empowered to conduct investigations that are in their inception exclusively criminal. To hold otherwise to confer court approval upon the kind of concurrent criminal and civil inquiries projected by the instant application would expand the already awesome power of the grand jury beyond tolerable limits...

The Court went on to say:

> "But the citizen ought not to be remitted to reliance upon official benevolence as his protection against slippery ambiguities."

The Court concluded in the words of Mr. Justice Holmes (p. 1352):

> "that the obligation of the citizens to turn square corners when they deal with the government...is a reciprocal one."

Appellant asks no more of this Court - only that the Government turn square corners in its dealing with Appellant.

It is submitted that since the Government has failed to so act, Appellant's motion to Quash the Grand Jury Subpoena should have been granted.

POINT IV

THE COURT BELOW ERRED IN NOT DIRECTING AN EVIDENTIARY HEARING ON APPELLANT'S CHARGE THAT IMPROPER DISCLOSURES OF CONFIDENTIAL AND SECRET INFORMATION WHICH MAY HAVE BEEN PRESENTED TO A GRAND JURY HAD BEEN MADE TO A NEWSPAPER REPORTER, WHO THEREAFTER PUBLISHED SAME.

The libelous article which was published in the Sunday News on May 11, 1975 unequivocally states that it is based upon information provided by the Organized Crime Task Force as well as other law enforcement agencies. (32). Appellant argued below that it believed that at least part of the information given to the news reporter was confidential and may have been presented previously before a Grand Jury. (13). Such disclosures, if made, would violate Rule 6(e) FRCP.[7] See, United States v. Smythe, 104 F. Supp. 283, (D.C. Cal. 1952).

Since Appellant specifically requested a hearing on this vital issue (4) it was error for the Court below not even to consider the argument upon the motion (S.M., July 21, 1976) merely because of Special Attorney Shanley's denial that he personally divulged such information to representatives of the Daily News.

That disclaimer standing alone does not eliminate the possibility that others in Mr. Shanley's office or working in conjunction with it made improper disclosures. Indeed on the day following an examination before trial of Mark Jacobson by the News in his libel suit, an FBI agent contacted Key Foods

and asked for its books and records. (12). Key Foods had been identified at the examination as an important customer of services provided by Jacobson family-owned companies. The FBI agent warned Key Foods that it would be subpoenaed before the Grand Jury if it did not cooperate and within two weeks this in fact happened. (12). It thus appears that there are open lines of communication between the News and law enforcement agencies, notwithstanding the insistence of the Special Attorney that what happened was merely a coincidence.

In view of recent criticism of the Grand Jury system and in light of circumstantial evidence that the secrecy of the Grand Jury had been infringed upon, a hearing should have been granted by the Court below to determine the facts.

See, Chief Judge Friendly's recent criticism of the shoddy practices which have arisen among some prosecutors in presenting the Government's case to a Grand Jury. See, United States v. Estepa, 471 F. 2d 1132 (2d Cir. 1974).

It is therefore respectfully submitted that the Court below erred in failing to consider, much less direct an evidentiary hearing on Appellant's contention that Rule 6(e) FRAP had been violated.

CONCLUSION

It is respectfully submitted that this Court should reverse the Order of the Court below and direct that the Subpoena served upon Appellant be quashed and that the Special Grand Jury impanelled be discharged, or alternatively that its investigation of the Jacobsons personally and Jacobson family-owned companies be curtailed or otherwise specifically limited.

It is further respectfully submitted that this Court grant Appellant's motion in so far as it requested a hearing with respect to its contention that secret information had been improperly given to a reporter of the News, together with such other and further relief as this Court deems just and proper under the circumstances.

Respectfully submitted,

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ADDENDUM (Footnotes)

1. Section 3331. Summoning and term.

(a) In addition to such other grand juries as shall be called from time to time, each district court which is located in a judicial district containing more than four million inhabitants or in which the Attorney General, the Deputy Attorney General, or any designated, Assistant Attorney General, certifies in writing to the chief judge of the district that in his judgment a special grand jury is necessary because of criminal activity in the district shall order a special grand jury to be summoned at least once in each period of eighteen months unless another special grand jury is then serving. The grand jury shall serve for a term of eighteen months unless an order for its discharge is entered earlier by the court upon a determination of the grand jury by majority vote that its business has been completed. If, at the end of such term or any extension thereof the district court determines the business of the grand jury has not been completed, the court may enter an order extending such term for an additional period of six months. No special grand jury term so extended shall exceed thirty-six months, except as provided in subsection (e) of section 3333 of this chapter.

2. Amendment VI

In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

3. Amendment VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

4. Amendment V

"No person...shall be deprived of life, liberty or property, without due process of law..."

5. Rule 6(g) FRCP

Discharge and Excuse. A grand jury shall serve until discharged by the court but no grand jury may serve more than 18 months. The tenure and powers of a grand jury are not affected by the beginning or expiration of a term of court. At any time for cause shown the court may excuse a juror either temporarily or permanently, and in the latter event the court may impanel another person in place of the juror excused.

6. Rule 48(b) FRCP

By Court. If there is unnecessary delay in presenting the charge to a grand jury or in filing an information against a defendant who has been held to answer to the district court, or if there is unnecessary delay in bringing a defendant to trial, the court may dismiss the indictment, information or complaint.

7. Rule 6(e) FRCP

Secrecy of Proceedings and Disclosure. Disclosure of matters occurring before the grand jury other than its deliberations and the vote of any juror may be made to the attorneys for the government for use in the performance of their duties. Otherwise a juror, attorney, interpreter, stenographer, operator of a recording device, or any typist who transcribes recorded testimony may disclose matters occurring before the grand jury only when so directed by the court preliminarily to or in connection with a judicial proceeding or when permitted by the court at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury....

A 202 Affidavit of Personal Service of Papers — LUTZ APPELLATE PRINTERS, INC.

FEDERAL COURT
SECOND CIRCUIT

GRAND JURY SUBPOENA DUCES TECUM,

Served Upon

AUTOMATED BREAD DISTRIBUTORS, CORP.,

Respondent-Appellant.

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF NEW YORK *ss.:*

I, James A. Steele *being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at* 310 West 146th Street, New York, New York

That on the 9th *day of* Sept. *19* 76 *at* 225 Cadman Plaza Brooklyn, N.Y.

deponent served the annexed appellant's brief *upon*

David G. Trager, U.S. Attorney Eastern District

the attorney *in this action by delivering a true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the herein.*

Sworn to before me, this 9th *day of* September *19* 76

Robert T. Brin

ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31-0418950
Qualified in New York County
Commission Expires March 30, 1977

James A. Steele
JAMES A. STEELE